Testimony of Helen Norton
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on the Employment Non-Discrimination Act of 2007 (H.R. 2015)

before the Subcommittee on Health, Employment, Labor, and Pensions
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Thank you for the opportunity to testify today. My name is Helen Norton, and I am an Associate Professor at the University of Colorado School of Law. My testimony here draws from my work as a law professor teaching and writing about employment discrimination issues, as well as my experience as a Deputy Assistant Attorney General for Civil Rights in the Department of Justice during the Clinton Administration, where my duties included supervising the Civil Rights Division's Title VII enforcement efforts.

Current federal law prohibits job discrimination on the basis of race, color, sex, national origin, religion, age, and disability.[1] While these statutes provide many valuable safeguards for American workers, federal law currently fails to protect gay, lesbian, bisexual, and transgender ("GLBT") employees from discrimination on the basis of sexual orientation and gender identity. Indeed, the case law is replete with decisions where federal judges have characterized egregious acts of discrimination targeted at GLBT workers as morally reprehensible yet utterly beyond the law's reach. Consider just a few examples:

Michael Vickers, a private police officer employed by a Kentucky medical center, alleged that his co-workers subjected him to harassment on a daily basis for nearly a year after learning that he had befriended a gay colleague.[2] According to Mr. Vickers, they repeatedly directed sexual slurs and other derogatory remarks at him, placed irritants and chemicals in his food and personal property, and engaged in physical misconduct that included a co-worker who handcuffed Mr. Vickers and then simulated sex with him – all because of Mr. Vickers' perceived sexual orientation.[3] In dismissing his claim just last year, the Sixth Circuit Court of Appeals concluded: "While the harassment alleged by Vickers reflects conduct that is socially unacceptable and repugnant to workplace standards of proper treatment and civility, Vickers' claim does not fit within the prohibitions of the law."[4]

[1] 42 U.S.C. §§ 2000e-2000e-17 (Title VII of the Civil Rights Act of 1964); 29 U.S.C. §§ 621-634 (Age Discrimination in Employment Act); 42 U.S.C. §§ 12101-12102, 12111-12117, 12201-12213 (Americans with Disabilities Act).
[2] *Vickers v. Fairfield Medical Center*, 453 F.3d 757, 759 (6th Cir. 2006), *cert. denied*, 127 S.Ct. 2910 (2007).
[3] *Id.* at 759-60.
[4] *Id. at* 764-65.

Postal worker Dwayne Simonton, a gay male, reported that co-workers targeted him for ongoing abuse because of his sexual orientation by directing obscene and derogatory sexual slurs at him and by placing pornographic and other sexually explicit materials in his worksite.[5] The alleged harassment was so severe that Mr. Simonton ultimately suffered a heart attack.[6] The Second Circuit Court of Appeals stated: "There can be no doubt that the conduct allegedly engaged in by Simonton's co-workers is morally reprehensible whenever and in whatever context it occurs, particularly in the modern workplace."[7] The court went on, however, to reject his claim, concluding that "[t]he law is well-settled in this circuit and in all others to have reached the question that Simonton has no cause of action under Title VII because Title VII does not prohibit harassment or discrimination because of sexual orientation."[8]

Robert Higgins, a gay male, brought a Title VII challenge to a workplace environment that the First Circuit Court of Appeals characterized as "wretchedly hostile."[9] Mr. Higgins alleged that his co-workers targeted him for both verbal and physical harassment because of his sexual orientation: he reported not only that they directed threats, sexual epithets, and other obscene remarks at him, but also that they poured hot cement on him and assaulted him by grabbing him from behind and shaking him violently.[10] The court nonetheless affirmed summary judgment against Mr. Higgins: "We hold no brief for harassment because of sexual orientation; it is a noxious practice, deserving of censure and opprobrium. But we are called upon here to construe a statute as glossed by the Supreme Court, not to make a moral judgment – and we regard it as settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation."[11]

To be sure, a few courts have broadly interpreted Title VII's prohibitions on sex discrimination to bar certain misconduct targeted at GLBT workers, such as sexual assault and other unwelcome physical conduct of an explicitly sexual nature by opposite-sex or same-sex co-workers, as well as employment decisions that punish workers who are perceived as failing to conform to certain gender stereotypes.[12] But even those

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[5] *Simonton v. Runyon*, 232 F.3d 33, 34-35 (2nd Cir. 2000).
[6] *Id.* at 34.
[7] *Id.* at 35.
[8] *Id.*
[9] *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 258 (1st Cir. 1999).
[10] *Id.* at 257.
[11] *Id.* at 259. For just a sampling of additional cases in this vein, *see Medina v. Income Support Div., New Mexico*, 413 F.3d 1131, 1135 (10th Cir. 2005) (rejecting heterosexual woman's Title VII claim challenging her lesbian supervisor's sexually explicit remarks and e-mail: "We construe Ms. Medina's argument as alleging that she was discriminated against because she is a heterosexual. Title VII's protections, however, do not extend to harassment due to a person's sexuality."); *Bibby v. Philadelphia Coca-Cola Bottling Co.*, 260 F.3d 257, 265 (3rd Cir. 2001) ("Harassment on the basis of sexual orientation has no place in our society. Congress has not yet seen fit, however, to provide protection against such harassment.") (citations omitted); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984); *cert. denied*, 471 U.S. 1017 (1985) (rejecting transgender employee's Title VII claim: "While we do not condone discrimination in any form, we are constrained to hold that Title VII does not protect transsexuals.").
[12] *E.g., Smith v. City of Salem, Ohio*, 378 F.3d 566, 572 (6th Cir. 2004) (holding that transgender employee sufficiently alleged Title VII cause of action for sex discrimination with his claim that he suffered adverse employment actions based on "his failure to conform to sex stereotypes concerning how a man should look

federal courts that have acknowledged the availability of these theories have noted Title VII's substantial limits in addressing discrimination experienced by GLBT Americans in the workforce.[13]

To fill these significant gaps in federal law, some states have enacted important antidiscrimination protections for GLBT workers: indeed, eleven states and the District of Columbia have enacted statutes that currently prohibit job discrimination on the basis of sexual orientation as well as gender identity,[14] while another eight states bar job discrimination on the basis of sexual orientation alone.[15] But employers in the majority of states remain free to fire, refuse to hire, or otherwise discriminate against individuals because of their sexual orientation and/or gender identity.

As a result, current law – both federal and state -- leaves unremedied a wide range of injuries and injustices suffered by GLBT workers. H.R. 2015 would fill these gaps by clearly articulating, for the first time, a national commitment to equal employment opportunity regardless of sexual orientation and gender identity.[16] More specifically, it forbids such discrimination in decisions about hiring, firing, compensation, and other terms and conditions of employment.[17] H.R. 2015 also incorporates the remedies and enforcement mechanisms available under Title VII.[18]

H.R. 2015 accomplishes antidiscrimination law's twin purposes of compensating victims of discrimination for their injuries and deterring future acts of bias while accommodating concerns that ENDA would interfere with religious institutions' ability to make employment decisions consistent with their religious beliefs. Indeed, H.R. 2015 not only incorporates Title VII's existing approach to issues involving religious institutions, but goes considerably further in accommodating such concerns.

First, section 6(a) of H.R. 2015 entirely excludes from the legislation's reach any employment action by "a religious corporation, association, educational institution, or

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and behave"); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1064-66, 1068 (9th Cir. 2002) (en banc), *cert. denied*, 538 U.S. 922 (2003) (holding that gay male plaintiff had stated a claim for Title VII sex discrimination based on his allegations that co-workers had physically and sexually assaulted him and had singled him out for harassment because he failed to conform to gender stereotypes of how men should behave).

[13] *See, e.g., Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2nd Cir. 2005) (rejecting lesbian plaintiff's claim of Title VII discrimination: "Like other courts, we have therefore recognized that a gender stereotyping claim should not be used to 'bootstrap protection for sexual orientation into Title VII.'") (citation omitted); *Hamm v. Weyauwega Milk Products, Inc.*, 332 F.3d 1058, 1063 (7th Cir. 2003) (rejecting plaintiff's Title VII claim by concluding that co-workers' alleged harassment of him was based on his perceived sexual orientation rather than on sex-based stereotypes).

[14] Along with the District of Columbia, those states are: California, Colorado, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Rhode Island, Vermont, and Washington. Oregon's legislation banning job discrimination on the basis of sexual orientation and gender identity will become effective in January 2008.

[15] Those states are Connecticut, Hawaii, Maryland, Massachusetts, Nevada, New Hampshire, New York, and Wisconsin.

[16] *See* H.R. 2015, § 2.

[17] *See id.* at § 4.

[18] *See id.* at § 10.

society which has as its primary purpose religious ritual or worship or the teaching or spreading of religious doctrine or belief."[19] In other words, an entire class of religious employers – including houses of worship, parochial schools, and religious missions -- is completely exempt from this bill.[20]

Second, section 6(b) further excludes from the bill's coverage an entire class of positions at other religious institutions: those positions "whose primary duties consist of teaching or spreading religious doctrine or belief, religious governance, supervision of a religious order, supervision of persons teaching or spreading religious doctrine or belief, or supervision or participation in religious ritual or worship" at religious corporations, associations, educational institutions, or societies that are not already completely exempt under section 6(a). In other words, H.R. 2015 also completely exempts from ENDA scrutiny those jobs involving spiritual teaching or ministerial governance – such as chaplains and teachers of canon law – at religious institutions that are not primarily engaged in worship or the spreading of belief – such as religiously-affiliated hospitals, social service agencies, and religious universities.[21]

Third and finally, section 6(c) makes clear that those religious institutions that are not primarily engaged in worship or the spreading of belief may still require that employees in non-ministerial positions conform to the institution's significant religious tenets – including such tenets regarding same-sex sexual activity.[22] For example, if a religiously-affiliated hospital chooses to require that its doctors and nurses conform to its declared religious tenet against same-sex sexual conduct, H.R. 2015 does not bar it from firing or refusing to hire doctors or nurses who engage in such relationships.

H.R. 2015 accommodates other concerns as well. For example, section 8(a)(4) makes clear that employers remain free, during work hours, to require "reasonable dress or grooming standards not prohibited by other provisions of Federal, State, or local law." In other words, employers remain free to establish and enforce otherwise lawful personal

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[19] *Id.* at § 6(a).

[20] Note that, at the time of its debate, Title VII faced similar objections from those who feared that its ban on religious discrimination would intrude upon religious institutions' ability to hire members of their own faith. Title VII similarly accommodated this issue by protecting the ability of "a religious corporation, association, educational institution, or society" to make employment decisions on the basis of religion. 42 U.S.C. §2000e-1(a). Such religious institutions are not, however, generally exempt from Title VII's prohibitions on discrimination on the basis of race, color, sex, or national origin. *See id.*

[21] This section codifies for ENDA purposes the "ministerial exception" adopted by most courts when considering Title VII's application to religious institutions' decisions about their spiritual leaders. Recognizing the significant constitutional and other interests involved, these courts have interpreted Title VII to exclude religious institutions' employment decisions involving "ministerial" positions. *See, e.g., McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972) (rejecting plaintiff minister's claim of sex discrimination by holding that Title VII does not apply to religious institutions' employment decisions regarding ministers and similar spiritual leaders); *EEOC v. Catholic University of America*, 83 F.3d 455 (D.C. Cir. 1996) (rejecting plaintiff's claim of sex discrimination by holding that the ministerial exception exempts tenure decisions involving teachers of religious canon law from Title VII).

[22] H.R. 2015, § 6(c).

appearance standards in the workplace.[23] The section further makes clear that an employee who notifies the employer that the employee has undergone or is undergoing gender transition must be held to otherwise lawful dress or grooming standards for the gender to which the employee has transitioned or is transitioning. For example, a transgender person designated female at birth must comply with the employer's otherwise lawful workplace grooming standards for men once he notifies his employer that he is transitioning. But while this section allows transgender employees to follow the standards established for the gender with which they identify, it does not protect employees who refuse to conform to those standards or who change their gender presentation from day to day.

H.R. 2015 similarly permits employers to respond to the privacy concerns of transgender employees and their co-workers by addressing access to sex-segregated facilities -- like locker rooms and shower facilities -- where being seen unclothed is unavoidable. Section 8(a)(3) permits employers to deny or limit access to such facilities "based on actual or perceived gender identity" so long as the employer "provides reasonable access to adequate facilities that are not inconsistent with the employee's gender identity. . . ." Examples include installing privacy screens or curtains in existing facilities or setting aside a time to provide a transgender employee sole access to an existing facility.

In sum, H.R. 2015 proposes to fill significant gaps in existing federal and state antidiscrimination law by clearly articulating, for the first time, a national commitment to equal employment opportunity regardless of sexual orientation and gender identity while accommodating concerns raised by religious institutions and other employers. Again, thank you for the opportunity to testify here today. I look forward to your questions.

[23] Note that § 8(a)(4) insulates only personal appearance standards that apply "during the employee's hours at work." H.R. 2015's general prohibition of job discrimination based on gender identity prohibits employers from discriminating against individuals based on their off-the-job expression of gender identity.